

IN THE MATTER OF THE ARBITRATION BETWEEN:

Wright County

OPINION AND AWARD

And

BMS Case No. 20-PA-0441

Wright County Deputies Association

Richard A. Beens, Arbitrator

APPEARANCES:

For the County

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For the Union

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Date of Award: May 4, 2020

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement between Wright County, Minnesota (“Employer” or “County”) and the Wright County Deputies Association (“Union”).¹ Robert Mossman (“Grievant”) was employed by Wright County as a Deputy Sheriff and is a Union member.

Hearings were held on February 24, 25, and March 12. Both parties acknowledge that this matter is properly before the arbitrator. Both were allowed to present witnesses, to cross-examine opposing witnesses, and to submit exhibits. Final closing briefs were filed on April 24, 2020 and the record was then closed.

ISSUE

The parties agree that the issue to be determined is as follows:

Did Wright County have just cause to terminate Deputy Robert Mossman and, if not, what is the proper remedy?

FACTUAL BACKGROUND

The Wright County, Minnesota Sheriff’s Department employs approximately 150 sworn deputies, 131 of whom are Union members. Grievant Robert Mossman was first employed in 2004. For most of his career, Grievant served as a patrol deputy. He was terminated on August 7, 2019.² The events leading to his termination occurred on the evening of December 20, 2018.

¹ Joint Exhibit 1.

² Joint Exhibit 3.

Grievant was assigned to patrol the Otsego area in northeastern Wright County. At approximately 9:53 on the evening of December 20, 2018, he stopped a vehicle operated by Thomas Pugsley for an equipment violation.³ In the course of asking Pugsley for his driver's license, Grievant detected the strong odor of marijuana emanating from the interior of the vehicle. In response to Grievant's questions, Pugsley readily admitted that had been smoking the drug and produced a zip lock bag containing marijuana from his coat pocket. When Grievant asked if there was more, Pugsley indicated three more bags were in a backpack in the vehicle's trunk. Mossman inspected the trunk and seized the marijuana, a bag containing apparent psychedelic mushrooms, a scale, and a large supply of new zip lock bags. Pugsley was arrested, handcuffed, placed in Grievant's squad car, and transported to the Wright County Jail in Buffalo, Minnesota. His car was towed and placed in a County impound lot. Upon arriving at the jail, Grievant turned Pugsley over to jailor Thomas Stemper.⁴ Advised that Pugsley was being held for drug offenses, Stemper asks if he had any additional narcotics on his body. Pugsley acknowledged that he did and produced a fifth bag of marijuana from an inside coat pocket. Stemper handed the newly discovered bag of pot to Grievant and observed him placing it in his squad car.

Two series of subsequent events eventually culminated in the County's determination to terminate Grievant; they involved the cash count and the fifth bag of marijuana.

Cash Count

As part of the brooking process, prisoners are taken to a shower area where they

³ County Exhibit 3 G.

⁴ County Exhibit 3 H.

undress, shower, and are given prison garb. While in the process of disrobing, Pugsley appeared very reluctant to remove his underwear. When finally ordered to do so by Stemper, the prisoner revealed the he had a large amount of cash tucked into the garment and handed it over to the jailor. Once Pugsley had completed the booking process, Stemper place him in a holding cell and returned to the booking area where he began counting the seized cash.

The Wright County jail is a new, modern facility. The booking area is under constant video surveillance by what the jailors term a “casino camera.” It provides four different views of the booking area, one of which looks directly down on a metal table where Stemper counted the seized cash. A lengthy video record was made of the entire counting process.⁵ Stemper counted out 107 pieces of currency which included the following numbers and denominations:⁶

| <u>Stacks</u> | <u>Denomination</u> | <u>Bill Count</u> | <u>Amount</u> |
|---------------|---------------------|-------------------|----------------|
| 7 | \$100.00 | 7 | \$ 700.00 |
| 10 | \$50.00 | 10 | \$ 500.00 |
| 14 | \$20.00 | 70 | \$1400.00 |
| 1 | \$20.00 | 4 | \$ 80.00 |
| 1 | \$10.00 | 9 | \$ 90.00 |
| 1 | \$5.00 | 3 | \$ 15.00 |
| 1 | \$1.00 | <u>4</u> | <u>\$ 4.00</u> |
| Total = | | 107 | \$2789.00 |

Stemper counted by creating stacks each containing \$100.00. However, the video clearly shows that, while creating \$100 stacks of \$20 dollar bills, he was momentarily distracted

⁵ County Exhibit 1 A F.

⁶ County Exhibit 1 C.

and only place four \$20 bills in one of the piles. Consequently, this led him to overcount the seized cash by \$20. Therefore, he believed he had counted \$2809.00 when the actual amount was \$2789.00. He placed the money in an unsealed plastic evidence bag along with a note upon which he wrote "\$2809." The bag was then left in full view of the "casino camera" until later picked up by Grievant.

Upon finishing his count at 21:33 hours, jailor Stemper begins trying to locate Grievant via phone and radio to hand over the cash for evidence processing. Stemper finally receives a return call from Grievant at 22:46 hours.⁷ Grievant first learns of the Pugsley's cash when Stemper tells him, "...found 2800 bucks in his shorts."⁸ A few minutes later, the "casino camera" captures Grievant arriving at the booking area, taking possession of the bag containing the cash, and then leaving the area.⁹

A second internal video camera shows Grievant walking down a long hallway leading to the Major Crime Investigations Unit ("MCIU") area within the sheriff's office. Three or four contract cleaning personnel are also seen as Grievant traverses the hallway to MCIU while holding the evidence bag containing the cash.

Grievant testified that he then entered the MCIU office through a door containing a key lock. He does not recall if the door to the office was locked or not at the time he entered.¹⁰ This is a relatively small room containing a desk and two computers.¹¹ Opposite the key lock

⁷ County Exhibit 1 X.

⁸ Ibid.

⁹ County Exhibit 1 A F.

¹⁰ County Exhibit 1 W, p. 14.

¹¹ County Exhibit 1 Y, TH-1, 2, and 3.

door is a keycard door leading to the MCIU processing lab, a much larger room often use to catalogue evidence.¹² An internal computer software program, titled Zuercher, records whenever a keycard is used to access the room.¹³ Neither the MCIU office or lab is under video surveillance.

When Grievant initially entering the MCIU office one or two of the cleaning personnel either were there or followed him into the office.¹⁴ They asked how long he would be there as they need to clean it. They left after Grievant advised he would be there, “...a couple hours.”¹⁵ Grievant further indicates there were about 10 cleaning crew members working in the area that evening.¹⁶ They were in the process of stripping linoleum in preparation for installing new flooring.

Despite his 15 years on the job, Grievant had never before been involved in a case involving a large amount of drug money. Consequently, shortly after arriving in the MCIU office, he places phone calls to Sgt. Hinton, the shift supervisor.¹⁷ Hinton advises Grievant to count the money in front of a witness, enter the amount into a Zuercher cash log, have the witness sign log, and seal the money and log in an evidence bag.

¹² Ibid., TH-4, 5, and 6.

¹³ County Exhibit 1 A B. The Zuercher system is a comprehensive software suite of computer programs designed for the Public Sector. Its Public Safety suite is specifically designed to accommodate all aspects of a police department, communications, entry and exit, evidence cataloguing, etc. See www.centernalsquare.com.

¹⁴ The cleaning crew were employed by ABM which has a contract for cleaning duties with Wright County. Testimony indicates ABM employees are vetted by the FBI and are cleared to perform their cleaning duties in secured areas. In this case, the three or four employees viewed in the video were in the process of stripping and refinishing floors in the MCIU area.

¹⁵ County Exhibit 1 S, p.6.

¹⁶ Ibid., p. 21.

¹⁷ County Exhibit 1 A A.

About 10 minutes after entering the MCIU office and after finishing some other work, Grievant begins counting the seized cash. Grievant acknowledged that he may have left the MCIU office and lab area to go to the bathroom or his squad car during this initial counting process. Although he believes he would have closed and locked the office key lock door and/or the MCIU keycard door while leaving the monies unattended, he cannot be certain.¹⁸ In any event, Grievant asserts he would not have intentionally left any doors unlocked during his absences.¹⁹

However, Grievant eventually realized he didn't have enough counter space in the MCIU office to accommodate all the cash., Consequently, he moves the cash through the keycard door and into the MCIU lab where he completed the counting process on a larger table.²⁰

Mossman's initial entry into the Zuercher system cash log was \$2809.00.²¹ He could only have obtained this figure from Stemper's note in the cash bag. Despite Hinton's advice, Grievant counts the cash alone three times and finally arrives at a figure of \$2589.00.²² Instead of 107, Grievant's count showed 101 bills, with five \$20's and one \$100 bill fewer than Stemper counted. The missing \$200 has never been located or explained. Approximately 51 minutes after his initial entry, Grievant modifies the Zuercher report to indicate \$2589.00.²³ Although the enclosed note from Jailor Stemper indicated \$2809.00, Grievant disregarded the

¹⁸ Ibid., pp. 22 – 23. The Zuercher system indicates Grievant did not go to his squad car as there is no record of him using his key card to exit the building during this period.

¹⁹ Ibid.

²⁰ Ibid., p. 22.

²¹ Country Exhibit 1 L.

²² County Exhibit 1 S, p. 8.

²³ County Exhibit 1 L.

discrepancy and, believing Stemper's note was not evidence, threw the it away.²⁴ He justifies this action by asserting Hinton said his would be, "...the official count."

Subsequent to his individual counts, Mossman sought a witness to the amount of cash. There is no evidence Hinton advised Grievant or that Grievant knew the count was required to be witnesses by a supervisor. Consequently, he looked for anyone in the jail area to witness the count. In response to Grievant's call to the booking area, Sgt. Terry Baxter came to the MCIU lab. Mossman informed Baxter that the money was in \$100 stacks. Grievant testified that Baxter asked, *"Do I need to count it individually or can I take your word for it?"* Grievant said he left it up to Baxter.²⁵ Rather than count the bills individually, Baxter simply counted the stacks. Grievant made no mention of the discrepancy between Stemper's and his count. Both Baxter and Grievant signed the cash log.²⁶ Grievant then placed the cash and cash log in an evidence bag and sealed it.²⁷

Fifth Bag of Marijuana

As previously indicated, Grievant seized four bags of marijuana at the time of Pugsley's arrest. A fifth bag, containing a few grams of marijuana, was seized by officer Stemper when Pugsley was first brought to the Wright County Jail. Stemper turned it over to Mossman at the scene and observed him place in his squad car.²⁸ Stemper's report is the last formal mention of the 5th bag. Grievant's initial arrest report makes no mention of it.²⁹ The fifth bag is not

²⁴ Ibid., p. 26.

²⁵ Ibid., p. 9.

²⁶ County Exhibit 2.

²⁷ County Exhibit 3 E.

²⁸ County Exhibit 3 D.

²⁹ County Exhibit 3 G., County Exhibit 1 G.

mentioned or even alluded to in Grievant's January 24, 2019 interview during the initial administrative investigation.³⁰ There is no indication it was ever formally placed in evidence.³¹

The question of what happened to the fifth bag doesn't even arise until Mossman's third interview on June 25, 2019, fully six months after Pugsley's arrest.³² Although Mossman's response is, at best, opaque, he contends he dumped all the marijuana together in order to get a tare weight. While retaining the original four bags seized, Grievant testified that he threw the fifth plastic baggie away. He acknowledged this was not standard procedure.³³

Initially concerned only about the discrepancy in the cash count, the Sheriff ordered an investigation to review the internal process for handling and counting money.³⁴ Completed in February, 2019, the resulting report recommended various changes in the money handling process.

However, in addition, the newly elected Sheriff, Sean Deringer, ordered an investigation of Grievant's role in the incident on March 25, 2019, more than three months after the initial incident.³⁵ On April 12, 2019, Deputy Mossman was placed on administrative leave and was first informed that he was the subject of an investigation into the missing \$200.00.³⁶ An internal affairs investigator completed the resulting report on July 22, 2019.³⁷ He summarized as follows:

³⁰ County Exhibit 3 F.

³¹ County Exhibit 1 G.

³² County Exhibit 1 Y.

³³ Ibid., p. 11.

³⁴ County Exhibit 3.

³⁵ County Exhibit 1 E.

³⁶ Ibid., F.

³⁷ Ibid., A.

“In conclusion, Deputy Mossman is responsible for the missing \$200.00, is responsible for the missing bag of suspected marijuana, he failed to submit an accurate and detailed report, he failed to notify anyone of the currency discrepancy, he attempted to coverup the currency, and he made repeated false and misleading statements during his internal affairs interviews. The allegation of employee misconduct on Deputy Robert Mossman is sustained.”³⁸

Wright County give Grievant a Notice of Intent to Terminate on August 6, 2019³⁹ and formally ended his employment the following day.⁴⁰ The Union grieved Mossman’s termination on August 8, 2019.⁴¹

APPLICABLE CONTRACT AND POLICY PROVISIONS

Collective Bargaining Agreement⁴²

Article 10 – Discipline

10.1 The Employer will discipline employees for just cause only.

Wright County Sheriff’s Office Policies⁴³

Searches

3.22.5 Documentation

Deputies are responsible to document any search and to ensure that the required reports are sufficient including, at minimum, documentation of the following:

- *Reason for the search*
- *Any efforts used to minimize the intrusiveness of any search (e.g., asking for consent or keys)*
- *What, if any, injuries or damage occurred*
- *All steps taken to secure property*

³⁸ Ibid., A, p. 31.

³⁹ Joint Exhibit 2.

⁴⁰ Joint Exhibit 3.

⁴¹ Joint Exhibit 4.

⁴² Joint Exhibit 1.

⁴³ County Exhibit 1 AE. Only those policies cited in Grievant’s termination letter are copied here.

- *The results of the search, including a description of any property or contraband seized*
.....

Standards of Conduct

340.5 Causes for Discipline

340.5.1 Laws, Rules and Orders

(b) Disobedience of any legal directive or order issued by any office member of a higher rank.

340.5.2 Ethics

(b) The wrongful or unlawful exercise of authority of any member for malicious purpose, personal gain, willful deceit or any other improper purpose.

(g) Any other failure to abide by the standards of ethical conduct.

340.5.7 Efficiency

(a) Neglect of duty.

(b) Unsatisfactory work performance including, but not limited to, failure, incompetence, inefficiency or delay in performing and/or carrying out proper orders, work assignments or the instructions of supervisors without a reasonable and bona fide excuse.

(c) Concealing, attempting to conceal, removing or destroying defective or incompetent work.

340.5.8 Performance

(a) Failure to disclose or misrepresenting material facts, or making any false or misleading statement on any application, examination form, or other official document, report or form, or during the course of any work-related investigation.

(b) The falsification of any work-related records, making misleading entries or statements with the intent to deceive or the willful and unauthorized removal, alteration, destruction and/or mutilation of any office record, public record, book, paper or document.

(c) Failure to participate in, or giving false or misleading statements, or misrepresenting or omitting material information to a supervisor or other person in a position of authority, in connection with any investigation or in the reporting of any office related-business.

340.5.9 Conduct

(h) Criminal, dishonest, or disgraceful conduct, whether on or off-duty, that adversely affects the member's relationship with this Office.

(i) Unauthorized possession of, loss of, or damage to Office property or the property of others, or endangering it through carelessness or maliciousness.

(m) any other on or off-duty conduct which any member knows or reasonably should know is unbecoming a member of this Office, is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this office or its members

344.1.1 Report preparation

Employees should ensure that their reports are sufficient for their purpose and reasonably free of errors prior to submission....

...All reports shall accurately reflect the identity of the persons involved, all pertinent information seen, heard or assimilated by the other sense and any actions taken. Employees shall not suppress, conceal or distort the facts of any reported incident nor shall any employee make a false report orally or in writing....

Professional Conduct of Peace Officer

388.2 Procedure

(b)(2)(a) Peace officers shall carry out their duties with integrity, fairness and impartiality.

(b)(2)(c) Peace officers shall truthfully, completely, and impartially report, testify and present evidence, including exculpatory evidence, in all matters of an official nature.

Asset Forfeiture

606.5.1 Cash Handling

...All cash shall be counted in the presence of another deputy and the envelope initialed by both deputies. A supervisor shall be contacted for cash in excess of \$1000. The supervisor shall also witness the count, and will initial and date the property documentation and specify any additional security procedures to be used...

606.8 Disposition of Forfeited Property

...No member of this Office may use property that has been seized for forfeiture until the forfeiture action has been completed and the Wright County Sheriff's Office has given written authorization to retain the property for official use.

Property and Evidence

804.3.1 Property Booking Procedure

All found property and evidence shall be collected according to the following guidelines:

(a) Photograph the item if necessary.

(e) Complete Property/Evidence documentation in RMS system.

(f) Secure the item in a storage locker in the property/evidence room.

804.3.4 Exceptional Handling

(f) All cash shall be counted in the presence of another deputy and the envelope initialed by both deputies.

804.5 Recording of Property

Deputies submitting items into evidence shall ensure that all property or evidence is bar coded and information entered into the property evidence management system.

Custodial Searches

902.3 Field and Transportation Searches.

A deputy should conduct a custody search of an individual after his/her arrest...

902.4.1 Searches at Sheriff's Office Facilities

Members shall take reasonable care in; handling the property of an individual in custody to avoid discrepancies or losses...

All property shall be inventoried by objective description (this does not include an estimated value).

OPINION

It is well established in labor arbitration that, where an employer's right to discipline an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proof. This case involves two basic allegations against Grievant: 1) although not directly stated, Grievant is, in essence, accused of pocketing the missing \$200 and, 2) that he violated various Departmental policies and procedures.

Although there is a broad range of opinion regarding the nature of that burden, in cases where the employee's alleged offense would constitute a serious breach of law or would be viewed as moral turpitude sufficient to damage an employee's reputation, most arbitrators apply a "clear and convincing evidence" standard. That requirement will be applied with respect to the first allegation.⁴⁴ However, the lower standard "preponderance of the evidence" is more appropriate when considering the alleged policy and procedure violations.

In determining the question of whether the employer acted with "just cause," the arbitrator is called upon to interpret the phrase as a term of art that is unique to collective bargaining agreements. While the arbitrator may refer to sources other than the contract for enlightenment as to the meaning of just cause, his essential role is to interpret the contract in determining whether a given action was proper.

A "just cause" consists of a number of substantive and procedural elements. A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee, express or implied, of the relevant rule or policy and a warning about potential discipline? A third factor for analysis is whether the disciplinary investigation was thoroughly conducted. Were statements and facts fully and fairly gathered without a predetermined conclusion? Finally, did Grievant violate the work rule or policies in question?

⁴⁴ Elkouri & Elkouri, *How Arbitration Works*, Eight Edition (2016), Ch. 15.3.D. ii.a. See Also: National Academy of Arbitrators, *The Common Law of the Workplace*, Second Edition (2005), §6.10 (2).

Did the County rely on reasonable rules or policies as a basis for terminating Grievant? The short answer is “Yes.” The Wright County Sheriff’s department has an extensive catalogue of policies and procedures.⁴⁵ These, albeit more detailed than many, are common to the vast majority of law enforcement departments. None of those the County relied on are either unreasonable or arbitrary. All appear designed to regulate officer conduct in accord with constitutional law, state law, and best policing practices.

Grievant points out that one policy particularly applicable here, 606.5.1 CASH HANDLING, has been amended and enlarged since his termination.⁴⁶ While true, that fact does not obviate or lessen the reasonableness of the original policy. It is eminently sensible to have a process in place for handling seized cash. Whether the policy was known and understood by Grievant is another question that will be discussed shortly.

In sum, I find the policies in place at the time Grievant was terminated, including policy 606.5.1, to be reasonable.

Did Grievant have prior notice, express or implied, of the applicable policies and a warning that he could be disciplined? Grievant had worked for the Sheriff’s office for 15 years. He had regular and extensive training aimed at familiarizing him with all aspects of the Wright County Sheriff’s Office Policy Manual.⁴⁷ However, only one acknowledgement, dated 1/13/15, related to policies in section 606 of the manual. It is unknown whether the training

⁴⁵ County Exhibit 1 AE.

⁴⁶ County Exhibit 10.

⁴⁷ County Exhibit 13. Grievant’s Policy Acknowledgement Report lists 207 “acknowledgements” between 1/13/15 and his termination.

acknowledgements stem from a classroom, computer, or self-study review of Policy Manual provisions.

Seizure of the amount of cash found on Pugsley is a rare event in Wright County. This was the first time in Grievant's 15-year career that he had seized and was required to count an amount over \$1000. Grievant testified that he either didn't know or did not remember the exact process required. Whether from blind luck, ignorance, or actual policy knowledge, he initially took the right step – he called his shift supervisor, Sgt. Josh Hinton for direction.⁴⁸ Sgt. Hinton vaguely recalls telling Grievant to photograph the evidence and have the money counted by two witnesses and then having a currency log signed by both.⁴⁹ Neither Hinton nor Grievant gave any indication of understanding Policy 606.5.1 requiring a supervisor to also witness the counting process for sums over \$1000. Hinton's live testimony was equally vague and unhelpful as he did not precisely recall his conversation with Mossman.

With respect to the fifth bag of marijuana, Grievant, a 15-year employee, acknowledged familiarity with customary evidence handling policies procedures.

The third factor, investigation of allegations against Grievant, is problematic. The County's compilation of evidence contains hundreds of pages filling a large three-ring binder. While thorough on its face, the final report has only one failing – no County investigator ever sought the names of or interviewed any of the cleaning crew who were in the vicinity of the MCIU office and lab while Pugsley's cash was being counted. Although there is significant circumstantial evidence pointing to him, this omission leaves open the possibility that someone

⁴⁸ County Exhibit 1 V.

⁴⁹ Ibid., p. 3.

other than Grievant could be responsible for the missing \$200. We do not know the extent of the cleaning crew's access, either by key or key-card, to various sections of the jail complex. No attempt was made to determine their whereabouts within the facility during the time the cash was in Grievant's possession. We do not know whether or not any cleaning crew member observed Mossman leaving, or other crew members entering, the MCIU office or lab during that same time period. This represents a serious deficiency in the investigation.

Finally, did Grievant commit the acts alleged? There can be no question Grievant violated a number of Wright County Sheriff's Department policies and procedures. This is particularly true with respect to his handling of the fifth bag of marijuana. There are numerous examples.

Policy 322.5 Documentation – Grievant failed to document the seizure of and his handling of the fifth bag of marijuana. At hearing, he testified that he combined the contents of the bag with that contained in the other four bags and threw the zip lock bag away. This same conduct also violates policies 340.5.7- Efficiency, 340.5.8- Performance, 340.5.9-Conduct, 344.1.1-Report Preparation, and 804.3-Property Handling. Failing to accurately account for all seized property and, even worse, throwing away part of it, is unacceptable under any circumstances. Similarly, Grievant did not recognize and report the discrepancy between his and Stemper's cash count. Given that discrepancy, throwing away Stemper's note should not have been discarded. Grievant's belief that it was simply "correspondence," while probably sincere, represents a serious lack of judgement. Nevertheless, it is also violative of the aforementioned policies.

The Union contends these were harmless omissions since Pugsley subsequently pled guilty. I disagree. The defendant's later guilty plea was purely serendipitous – had he or his counsel realized Grievant's shoddy handling of the fifth bag and the cash count differences, a contested trial could well have occurred. Grievant's conduct would not have withstood a competent cross-examination and could have seriously jeopardized the prosecution case. Honest, accurate police work forms the very foundation of the criminal justice system. Without it, public trust in the impartiality and fairness of the system is corroded.

In sum, I find that the County had just cause to discipline Mossman for policy violations.

We turn now to the missing \$200. Video evidence clearly shows that Jailor Stemper had (mis)counted \$2789 cash taken from Pugsley's underwear. Further, testimony and exhibits show that Mossman counted and secured in evidence only \$2589. Based on circumstantial evidence, the County Sheriff concluded that Mossman pocketed the missing \$200 and so testified. Nevertheless, I find Grievant's ultimate culpability on this issue to be less clear. He had never before seized and been responsible to count cash over \$1000. Obviously unclear on the procedures to follow, he called his shift supervisor, Sgt. Hinton.⁵⁰ Hinton advised Grievant that his count must be witnessed, a cash log signed by both, and the funds are to be secured in a sealed evidence bag. He also told Mossman that his would be the "official count." However, whether through ignorance, laziness, or lack of knowledge, Hinton did not advise Mossman that policy also required a supervisor to be involved in the count. Consequently, that didn't happen. After initially counting the funds three times, Grievant went to some lengths to find a required

⁵⁰ County Exhibit 1 AA.

witness. A jailor, Sgt. Baxter, responded. However, he counted piles, not individual bills contrary to office policy.

As in many discipline cases, witness credibility plays a large role. The voluminous evidence compiled by the county, while highly credible, is still just circumstantial evidence. Such evidence can be sufficient so long as it circumscribes and forecloses all other reasonable possibilities. An arbitrator must use extreme care when a case is based solely on circumstantial evidence.⁵¹

In this case, the County left one reasonable scenario unexplored. No one from the cleaning crew was ever interviewed. While they well may have been vetted by their contract employer and/or the FBI, failure to even determine their names, much less obtain statements evidences a “confirmation bias” on the part of the County. The County’s laser focus on Grievant appears to have foreclosed investigating any other possible culprits.

Cleaning crew employees followed Mossman into the MCIU office and asked how long he would be using the room. They remained working in the general area while he counted the cash. Although Grievant believes he locked the MCIU office and lab doors when he left in the midst of the count, he is uncertain. Did the cleaners have key or code access to the supposedly secure rooms? We don’t know. The possibility that one of them accessed the MCIU office and took the missing \$200 during Mossman’s temporary absences can’t be discounted. Last, during later interviews and at the arbitration hearing, Mossman adamantly and emotionally denied taking the missing money. His assertions appeared credible, genuine, and heartfelt.

⁵¹ Elkouri & Elkouri, *How Arbitration Works*, Eight Edition (2016), Ch. 8.4.I.i.

Under the facts before me, I find the County has not met their “clear and convincing” burden of proof with respect to the allegation that Grievant took the \$200.00. Consequently, I find the County did not have just cause to discipline Mossman for this allegation.

Is discharge an appropriate penalty under the facts of this case? While an arbitrator has the power to determine whether or not an employee’s conduct warrants discipline, his discretion to substitute his own judgment regarding the appropriate penalty for management’s is not unlimited. Rather, if an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, he should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he must conclude the employer exceeded its managerial prerogatives and impose a lesser penalty. In reviewing the discipline imposed on an employee, an arbitrator must consider and weigh all relevant factors including employee’s length of service, his work record, and the seriousness of the misconduct.

Deputy Mossman has worked for the Wright County Sheriff’s Department for over 15 years. During that time, he received two disciplines: one in 2012 for failing to immediately report an accident with his squad car⁵² and a second in 2014 for leaving his duty station early and consequently failing to respond to a dispatch call.⁵³ While not a spotless record, neither rise to the level of the current case. Mossman’s policy and procedure violations cut to the heart of law enforcement credibility. His cavalier treatment of the 5th bag of marijuana, failing

⁵² County Exhibit 14.

⁵³ County Exhibit 15.

to report it, dumping its contents into another seized bag, and, finally, throwing away the container represent, at best, extremely poor judgement and shoddy police work. Although it may have been rooted in confusion over the “official count,” throwing away Stemper’s note with the original cash count and, in addition, failing to note and report the discrepancy between his and the jailor’s count show similar inattention to detail. The “no harm, no foul” defense asserted by the Union rings hollow. True, Grievant’s failures did not affect Pugsley’s ultimate guilty plea. However, that result was merely fortuitous. Had Grievant’s failures been revealed through cross-examination, he, the Sheriff’s office, and the prosecutor would have been rightly embarrassed – and the case could well have fallen. Adherence to police protocols and attention to detail, both inculpatory and exculpatory, are the backbone of credible law enforcement.

Having said all that, I am reluctant to rubber stamp a termination based on the record before me. I doubt we’ll ever again see Grievant involved in a similar set of circumstances. In all but a few exceptional cases, the ultimate goal of workplace discipline should be to correct, not just to punish.⁵⁴ I have tailored the following Award with this maxim in mind.

⁵⁴ National Academy of Arbitrators, *The Common Law of the Workplace*, Second Edition (2005), § 6.7.

AWARD

The grievance is SUSTAINED in part and DENIED in part. I order that Grievant's termination be reduced to a two (2) month suspension and that he be reinstated forthwith as a Wright County Sheriff's Deputy. Further, I order that he be made whole with respect to pay, benefits, and seniority, minus any sums earned during the pendency of this grievance. I shall retain jurisdiction of this matter for a period of sixty (60) days from this date to resolve any issues that may arise during implementation of this order.

Dated: May 4, 2020

Richard A. Beens, Arbitrator